Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1525

NEREUS SHIPPING, S.A.,
Petitioner,
against
COMPANIA ESPANOLA DE PETROLEOS, SA.,
Respondent.

NEREUS SHIPPING, S.A.,
Petitioner,
against
HIDROCABUROS y DERIVADOS, C.A.,
Respondent,
and
COMPANIA ESPANOLA DE PETROLEOS, SA.,
Respondent.

In the Matter of the Arbitration
between
NEREUS SHIPPING, S.A.,
Petitioner,
against
HIDROCABUROS y DERIVADOS, C.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Nereus Shipping, S.A. respectfully prays that a writ of certiorari issue to review the order and

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opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on December 12, 1975.

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported, but has been unofficially reported at 1975 AMC 2421, and is included in the annexed appendix. The opinion of the District Court dated December 18, 1974 is officially reported at 385 F.Supp. 1155, and unofficially at 1975 AMC 474. The opinion of the District Court dated March 21, 1975 has not been officially reported but is unofficially reported at 1975 AMC 1009. Both opinions of the District Court and Petitioner's petition for rehearing *en banc* are included in the annexed appendix.

Jurisdiction

The decision and order of the Court of Appeals was entered on December 12, 1975. A timely petition for rehearing *en banc* was denied on January 26, 1976 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

Questions Presented

1. Do the federal courts have power under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* to order consolidation of separate arbitrations before a singe arbitration panel?

2. May the federal courts remove an entire arbitration panel properly appointed pursuant to an arbitration agreement for the sole purpose of ordering consolidation of separate arbitrations between different parties?

3. Is the role of the federal courts under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* to enforce valid arbi-

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tration agreements made by the parties, or may the courts disregard such agreements and fashion new arbitration agreements changing the arbitration panel and the number and method of selecting such arbitrators?

Statutes Involved

United States Code, Title 9

§ 3. Stay of proceeedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the

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party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no

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method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Federal Rules of Civil Procedure

Rule 42. Consolidation; Separate Trials.

(a) CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Rule 81. Applicability in General.

(a) TO WHAT PROCEEDINGS APPLICABLE.

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(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the procedings.

• • •

Statement of the Case

The decision of the Court of Appeals was entered on separate appeals from two actions and a petition for the appointment of a third arbitrator under the Federal Arbitration Act, 9 USC § 5. The parties are Nereus Shipping, S.A. (hereinafter referred to as "Nereus" or "Petitioner"), Hidrocarburos y Derivados, C.A. (hereinafter referred to as "Hideca"), and Compania Espanola de Petroleos, S.A. (hereinafter referred to as "Cepsa"). Cepsa appealed from the decision of the District Court dated December 18, 1974 (hereinafter referred to as the "First Decision"), and Nereus appealed from the decision of the District Court dated March 21, 1975 (hereinafter referred to as the "Second Decision").

In an action commenced by Cepsa against Nereus, the First Decision denied Cepsa's motion for declaratory relief and an injunction to delay a scheduled arbitration between Nereus and Cepsa (hereinafter referred to as the "Nereus-Cepsa Arbitration") until after an arbitration was held between Nereus and Hideca (hereinafter referred to as the "Nereus-Hideca Arbitration"). In an action sub-

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sequently commenced by Hideca against Nereus and Cepsa for a similar injunction delaying the Nereus-Cepsa Arbitration, the Second Decision i) consolidated the two arbitrations, ii) removed the three arbitrators in the Nereus-Cepsa Arbitration, and iii) fashioned a new arbitration appointment procedure and a larger arbitration panel to consist of five arbitrators.

The relevant facts leading up to the actions in the District Court are as follows:

Nereus as Owner and Hideca as Charterer entered into a maritime contract of affreightment dated January 27, 1971 for the transportation in vessels furnished by Nereus of oil cargoes for a period of three (3) years (hereinafter referred to as the "Contract"). The cargoes which Hideca was to furnish under the Contract were crude oil cargoes consigned to Cepsa, and Nereus and Cepsa entered into Addendum No. 2 to the Contract (hereinafter referred to as "Addendum No. 2").

The Contract provided in Part II, clause 24, for arbitration of disputes between Nereus and Hideca in New York before a panel of three (3) arbitrators. The terms of Addendum No. 2 signed by Cepsa incorporated the arbitration clause of the Contract and provided as follows:

> "In connection with the contract of affreightment, embodied in the Charter Party drawn up at New York and dated 27th January, 1971, between Nereus Shipping S.A. as Agents for Owners (hereinafter called the Owner), and Hidrocarburos y Derivados, C.A. (HIDECA) (hereinafter called the Charterer), being that the Charterer shall use the tonnage contracted under the present Charter Party for the transportation, during the period of three years commencing November 1971/January 1972, of crude oil under a CIF contract to be signed with Compania Espanola de Petroleos, S. A. (CEPSA) we, Compania Espanola de Petroleos, S.A., hereby agree that, should HIDECA

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default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party. Provided, however, that Compania Espanola de Petroleos, S.A., shall not be responsible for any payments or damages as a result of HIDECA's default, prior to receiving written notice from the Owner advising us that HIDECA is in default, and calling upon us to assume performance of the Charter Party."

Although loosely referred to as a guaranty, Addendum No. 2 was in the nature of a novation under which Cepsa agreed to itself perform the balance of the Contract but did not guarantee payment of Hideca's obligations.

At a time when the freight market rate for tanker vessels was far below the freight rate specified in the Contract, Hideca failed to pay freight for a completed voyage. Nereus thereupon called upon Cepsa to perform the balance of the voyages for the third year of the Contract and Cepsa refused to do so.

Thereafter, Nereus demanded arbitration with Hideca under the arbitration clause of the Contract to recover the unpaid freight for the performed voyage together with other amounts due to Nereus under the Contract. Hideca asserted counterclaims and each party nominated an arbitrator in the Nereus-Hideca Arbitration. Nereus also demanded arbitration with Cepsa under Addendum No. 2 to recover damages caused by Cepsa's refusal to perform the balance of the voyages.

The wording of the arbitration clause applicable to both the Nereus-Hideca and the Nereus-Cepsa Arbitrations is as follows:

"Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbi-

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tration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, *before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final.* Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city abovementioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators." (Italics added)

On the date the first arbitration hearing was scheduled to commence in the Nereus-Cepsa Arbitration before a panel of three Arbitrators appointed in accordance with the express provisions of the arbitration clause, Cepsa moved by order to show cause to stay the hearings until

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completion of the Nereus-Hideca Arbitration. The attorneys for Hideca attended in Court in support of Cepsa's motion for a preliminary injunction and submitted an affidavit in support thereof.

After the First Decision refused to grant the injunction sought by Cepsa and supported by Hideca, and after Cepsa filed its notice of appeal, Hideca filed a complaint in admiralty for the same injunctive relief which the Court had previously denied. Hideca also filed a petition for the appointment of a third arbitrator in the Nereus-Hideca Arbitration.

The Second Decision of the District Court i) effectively removed the three (3) arbitrators appointed as the panel in the Nereus-Cepsa Arbitration; ii) directed the Nereus-Cepsa Arbitration and the Nereus-Hideca Arbitration to be consolidated before a panel of five Arbitrators; and iii) directed that the panel be selected in a manner totally different from that provided in the arbitration clause of the Contract and of Addendum No. 2.

This is not a case where the party in the middle has a claim over against either of the remaining two parties, since Hideca and Cepsa have a common interest as adversaries of Nereus. However, the Second Decision ordered that the adversaries of Nereus, in effect, would appoint four of the five members of the arbitration panel. Nereus was to appoint one arbitrator while its adversaries were to appoint two arbitrators. Those three arbitrators would then have selected two more arbitrators to complete a five member panel, a result which was prejudicial to Nereus and contrary to the arbitration agreements between the parties.

The Court of Appeals affirmed the First and Second Decisions except that it modified the manner of selection of the five member arbitration panel as follows:

> "(1) Each of the three parties shall appoint its arbitrator within twenty (20) days after the filing of our

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opinion in this case and, if any party shall fail to nominate its arbitrator within this time, this arbitrator shall be appointed by the District Judge. The three arbitrators thus chosen shall jointly appoint two additional arbitrators.

"(2) The appointment of the two additional arbitrators must be done by the unanimous action of the three arbitrators already appointed by the parties. And, if such unanimous selection of the two additional arbitrators is not made within ten (10) days after the three original arbitrators have been chosen, then the two new arbitrators shall be selected by the District Judge."

The decision of the Court of Appeals for the first time involves the federal courts in the removal of arbitration panels duly established in accordance with the provisions of a valid arbitration agreement. The decision also for the first time involves the courts in modifying arbitration agreements and in the fashioning of arbitration panels different in number and manner of selection from the terms of the arbitration agreement between the parties.

Reasons for Granting the Writ

The Court of Appeals has (i) decided an important question of federal law, which has not been, but should be, directly settled by this Court, and (ii) has decided a federal question in a way in conflict with the express language of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and with the applicable decisions of this Court and decisions of other Courts of Appeal.

Insofar as the decision of the Court of Appeals has removed an entire arbitration panel and fashioned a new arbitration procedure for appointment of a larger arbitration panel, the decision will have great impact upon the role of the federal courts in all arbitrations covered by federal law.

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POINT I

The role of the courts has been tto enforce arbitration agreements and not to fashioon submissions to arbitration fundamentally differentt from the agreement of the parties.

The courts have consistently held thhat arbitration is a creature of contract between the partiees, who have agreed to a specific method of resolving theirr disputes, and the role of the courts is simply to enfore thee arbitration agreement made by the parties. In *Scherkk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510, 519, 94 S.Ct. 24499 (1974), this Court held, in part, as follows:

> "The Arbitration Act of 1925, 99 USC §§ 1 et seq. [9 USC §§ 1 et seq.], reversing ceenturies of judicial hostility to arbitration agreementss, was designed to allow parties to avoid 'the costlinesss and delays of litigation, and to place arbitration agreements upon the same footing as other contracts.' . . ."
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> "An agreement to arbitrate beefore a specified tribunal is, in effect, a specializeed kind of forum-selection clause that posits not onlyy the situs of suit but also the procedure to be used im resolving the dispute."

In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 403, 87 S.Ct. 1801 (1967), tthis Court held, in part, as follows:

> "The key statutory provisions aree §§ 2, 3, and 4 of the United States Arbitration Act oof 1925. Section 2 provides that a written provision ffor arbitration 'in any maritime transaction or a conttract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save uppon such grounds

as exist at law or in equity for the revocation of any contract'. Section 3 requires a federal court in which suit has been brought 'upon any issue referable to arbitration under an agreement in writing for such arbitration' to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. Section 4 provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,' and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.

* * * *

"With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.'

* * * *

"We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

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Instead of enforcing the arbitration agreement contained in the Contract and incorporated in Addendum No. 2, the decision of the Court of Appeals has drafted a new "arbitration agreement" and thrust it upon the parties. This result is contrary to the provisions of the Federal Arbitration Act, 9 USC § 1 *et seq.* and to all prior decisions.

In *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 312 (5th Cir. 1970), the Court stated: "The arbitration process is a private one essentially tailored to the needs of the contracting parties, who have agreed upon this method for the final adjustment of disputes under their contract". In *Ocean Industries, Inc.* v. *Soros Associates International Inc.*, 328 F.Supp. 944, 947 (S.D.N.Y. 1971), the Court stated "Arbitration is a creature of contract (citing cases). The issue * * * is whether there was mutual assent to the Arbitration Agreement".

In *A/S Ganger Rolf* v. *Zeeland Transp. Ltd.*, 191 F. Supp. 359, 363 (S.D.N.Y. 1961), where the Arbitration clause was self-executing in the event a party refused to name an arbitrator after receipt of a demand from the other party, the Court, in refusing the intervene under 9 U.S.C. § 4 held, in part, as follows:

> "Petitioners, while conceding that they have the right under the arbitration clause to proceed ex parte, urge that they have no duty to do so and that therefore they may waive the right and elect to petition the court for relief under the Arbitration Act. The petitioners overlook *the object of the Arbitration Act which contemplates only the enforcement of the arbitration agreement made by the parties themselves in the manner they themselves provide.* Petitioners, by waiving rights and remedies given to them by the arbitration clause cannot thereby acquire a new right not granted by the Act to have the court compel arbitration in a manner different from that provided by the clause. Having designed their own remedy for recal-

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citrance they cannot, over respondent's objection ignore that remedy and pursue another." (Italics added)

In *Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 229 N.Y.S. 2d 200, 201 (1st Dept. 1962) aff'd, 12 N.Y. 2d 409, 240 N.Y.S. 2d 23 (1963), which involved a consolidation of arbitrations, the Court held, in part, as follows:

> "We recognize that where jurisdiction is conferred by contract any party has the right to have his controversy tried by the forum he has contracted for, and he cannot be compelled to litigate before any other . . ." (citing cases)

In *Stewart Tenants Corp.* v. *Diesel Construction Co.*, 229 N.Y.S. 2d 204, 206 (1st Dept. 1962), the Court in reversing an order consolidating two arbitrations, held, in part, as follows:

> "As the foregoing implies, we regard the provision for consolidation as error. 'Arbitration is essentially a creature of contract' (citing cases). When the contracting parties have agreed upon an arbitral forum, to impose another upon either of them without consent would be to rewrite their agreement (citing cases)."

The Court of Appeals has held that Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure permit the consolidation of arbitrations and that the remedy of consolidation "must include the essential implementation of the consolidated proceeding by molding the method of selection and the number of the arbitrators so as to fit this new situation".

This decision plainly and simply means that the courts i) need not enforce arbitration agreements made by the parties, and ii) will become involved in fashioning new arbitration agreements, panels and procedures. However,

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prior cases have held that the courts will not even compel arbitration under 9 U.S.C. § 4 where the arbitration agreement provides its own remedy for recalcitrance.[1]

POINT II

The decision of the Court of Appeals removing a proper arbitration panel is a departure from prior decisions and contrary to the Federal Arbitration Act.

The First Decision stated, in part, as follows:

> "After Nereus named an initial arbitrator and Cepsa failed to name its own arbitrator, Nereus named a second arbitrator pursuant to the above clause. Those two arbitrators then appointed a third arbitrator in accordance with the arbitration clause of the contract."

The panel of arbitrators were all members of the Society of Maritime Arbitrators, the third arbitrator was the President of that Society. However, the Court of Appeals decision ordered removal of the entire arbitration panel in order to fashion a new five-member panel.

In *San Carlo Opera Co.* v. *Conley,* 72 F.Supp. 825, 833 (S.D.N.Y. 1946), aff'd 163 F.2d 310 (2d Cir. 1947), the Court held, in part, as follows:

> "The power of the courts, to set aside an award of a board of arbitrators, after bias or prejudice is shown, is well settled (citing authorities). But where the dispute has proceeded to arbitration, the court does not appear to have the power to order a substitution of arbitrators. In Williston, Contracts, 1923, it is ob-

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[1] See *Kentucky River Mills* v. *Jackson,* 206 F.2d 111 (6th Cir. 1953), *cert. denied* 346 U.S. 887; *Standard Magnesium Corp.* v. *Fuchs,* 251 F.2d 455 (10th Cir. 1957); *A/S Ganger Rolf* v. *Zeeland Transp. Ltd.,* 191 F.Supp. 359 (S.D.N.Y. 1969); *Texas Eastern Transmission Corp.* v. *Barnard,* 177 F.Supp. 123 (E.D.Ky. 1959).

served: 'The American statutes contain no provision for vacating the office of arbitrator in the event he is shown to be biased or prejudiced during the proceeding.'"

In *Sanko Steamship Co.* v. *Cook Industries, Inc.*, 495 F.2d 1260, 1264 (2d Cir. 1973), the Court held, in part, as follows:

> "In such cases, a refusal by the panel to compel an allegedly partial arbitrator to step down will generally be reviewable by a district court only after an award has been made. (Citing cases). However, in most cases, the parties themselves will be able to compel the disqualification of arbitrators suspected of bias prior to the commencement of the proceedings. For example, under § 11 of the Maritime Arbitration Rules of the Society of Maritime Arbitrators, as under § 18 of the Rules of the American Arbitration Association, a party may have an arbitrator replaced simply by failing to waive a presumptive objection that arises if any circumstances are disclosed by the arbitrator prior to the hearing which tend to suggest bias."[2]

The arbitration panel was appointed in accordance with the terms of the arbitration agreement. There was no suggestion that any member of the Nereus-Cepsa Arbitration panel was not an unbiased and proper arbitrator.

The Court's decision is authority for the proposition that in order to consolidate two separate arbitrations, a federal court may remove an entire panel of arbitrators properly appointed pursuant to an arbitration agreement. In other cases the panel to be removed may have been appointed by

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[2] Other cases holding that the Courts cannot remove arbitrators in a pending arbitration are *Petition of Dover Steamship Co.*, 143 F.Supp. 738 (S.D.N.Y. 1956) and *Invotra N.V.* v. *Luria Bros. & Co.*, 1958 AMC 886 (S.D.N.Y. 1958).

the parties or by the American Arbitration Association or by a trade association. A subsequent motion for consolidation should not permit a court to eliminate an entire panel of arbitrators and establish a new panel and procedure contrary to that agreed by the parties.

POINT III

The decision of the Court of Appeals is contrary to the provisions of the Federal Arbitration Act, 9 USC § 1 *et seq.*

There was no petition to compel arbitration before the District Court when it rendered its Second Decision. On the contrary there was pending only i) Hideca's complaint for a preliminary injunction and ii) a petition under 9 USC § 5 by Hideca for the appointment of a third arbitrator in the Nereus-Hideca Arbitration. Despite the foregoing the Court of Appeals has ordered Nereus to proceed to arbitration before five arbitrators in a consolidated arbitration with two adversaries, Hideca and Cepsa.

The only provision in the Federal Arbitration Act under which a Federal Court may compel arbitration is Section 4, 9 USC § 4, which states, in part, as follows:

> "A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed *in the manner provided for in such agreement* . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement* . . ." (Italics added)

Nereus never failed or refused to arbitrate either with Cepsa or with Hideca. In fact Nereus was prevented by

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the restraining orders of the District Court from going forward with the Nereus-Cepsa Arbitration in the manner provided in the arbitration agreement. Neither Hideca nor Cepsa was a party which was, within the language of 9 USC § 4, aggrieved by the "failure, neglect or refusal" of Nereus to arbitrate.

The Federal Arbitration Act is replete with language requiring that arbitration should proceed in accordance with the arbitration agreement between the parties. Section 3, 9 USC § 3, provides for a stay of an action "until such arbitration has been had in accordance with the terms of the agreement". Section 4, 9 USC § 4, provides for "an order directing that such arbitration proceed in the manner provided in such agreement". Section 5, 9 USC § 5, provides that "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed".

No prior decision by a United States Court of Appeals has ever held that a court acting under the Federal Arbitration Act and in particular Section 4 thereof, 9 USC § 4, has power to order different parties to submit their disputes to a single panel of arbitrators in a consolidated arbitration. There is no provision in the Act for consolidation of separate arbitrations.

The decision of the Court of Appeals in ordering consolidation has disregarded all of the aforesaid statutory language and has relied upon Rule 42 of the Federal Rules of Civil Procedure to overcome the provisions of the Federal Arbitration Act. However, Rule 42, which deals with consolidation and separate trials, permits consolidation "when actions involving a common question of law or fact are pending before the court".

The questions of law and fact were for the arbitrators and were not pending before the court. Instead of expediting arbitration, the actions of the Courts have delayed the hearings and the Court of Appeals has intervened to change the arbitration agreements between the parties.

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The arbitration clause of the Contract and of Addendum No. 2, under which Nereus and Cepsa are required to arbitrate, specified a panel of three arbitrators to be appointed in a totally different manner than that ordered by the Court. As a result, the decision of the Court of Appeals is contrary to the express language of the statute.

CONCLUSION

The decision of the Court of Appeals has decided an important question of federal law which will involve federal courts in fashioning arbitration agreements rather than enforcing them as provided in the Federal Arbitration Act, 9 USC § 1 *et seq.* For all of the foregoing reasons, a writ of certiorari should issue to review the order and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Memorandum Decision of Stewart, U.S.D.J., 385 F. Supp. 1155, 1975 AMC 474 (SDNY 1974).

COMPANIA ESPANOLA DE PETROLEOS, S.A., Plaintiff,

v.

NEREUS SHIPPING, S.A.,
Defendant.

No. 74 Civ. 5102.

United States District Court,
S. D. New York.

Dec. 18, 1974.

MEMORANDUM

STEWART, District Judge.

Plaintiff Compania Espanola de Petroleos, S. A. ("Cepsa") brings this action for declaratory and injunctive relief against defendant Nereus Shipping, S. A. ("Nereus"). Plaintiff seeks an order from this court that it is not legally obligated to proceed to arbitration as demanded by defendant in a dispute arising out of a contract of affreightment ("contract") between the defendant and charterer Hidrocarburos Y Derivados, C. A. ("Hideca").

Under the contract, Hideca agreed to ship 600,000 tons of crude oil and/or dirty petroleum products, 10 percent more or less at defendant's option, for a three-year period commencing December 24, 1971. While no dispute arose during the first two years of the contract, defendant alleges that Hideca defaulted in its performance of the contract during the third year. That dispute is the subject of separate arbitration proceedings by Hideca against defendant Nereus; there is apparently no contention that these

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arbitration proceedings were improperly brought and, in any event, they are not presently before us.

What is before us is the issue of whether plaintiff Cepsa is obligated to arbitrate disputes arising from a Letter of Guaranty—Addendum 2 to the contract—signed by plaintiff Cepsa as a guarantor of Hideca. Under the guaranty, Cepsa agreed that "should Hideca default in payment or performance of its obligations under the Charter Party [contract of affreightment], we will perform the balance of the contract and assume the rights and obligations of Hideca on the same terms and conditions as contained in the Charter Party."

The addendum continues:

> Provided, however, that Compania Espanola de Petroleos, S. A. shall not be responsible for any payments or damages as a result of HIDECA's default, prior to receiving written notice from the Owner [Nereus] advising us that HIDCEA is in default, and calling upon us to assume performance of the Charter Party.

Believing that Hideca had defaulted in its performance of the contract of affreightment, Nereus notified Cepsa on July 24, 1974 that Hideca was in default and called upon Cepsa to perform the remainder of Hideca's obligations under the contract. There then followed an exchange of communications between plaintiff and defendant during which time Nereus contended that Cepsa was not fulfilling its obligations under the guaranty, and Cepsa countered that Nereus had improperly invoked the guaranty since Hideca was not actually in default.

Following this exchange, defendant Nereus served plaintiff with a demand for arbitration on September 3, 1974, on the theory that Cepsa had agreed to be bound by the

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arbitration clause in the contract when it signed the letter of guaranty. The arbitration clause provides in relevant part that "any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York. . . ." It further provides that:

> If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator has been appointed by the other party.

After Nereus named an initial arbitrator and Cepsa failed to name its own arbitrator, Nereus named a second arbitrator pursuant to the above clause. Those two arbitrators then appointed a third arbitrator in accordance with the arbitration clause of the contract.

The arbitration proceedings were scheduled to begin November 21, 1974. On that date, plaintiff Cepsa filed this action and successfully sought a temporary restraining order from this court enjoining the commencement of the scheduled arbitration proceedings.

Plaintiff now seeks an injunction to enjoin the defendant and the arbitrators from commencing the arbitration proceedings. Plaintiff also seeks a declaratory judgment that it is not subject to the arbitration clause in the contract between Nereus and Hideca; that, alternatively, such arbitration may proceed only after a finding that Hideca has actually defaulted in its contractual obligations with Nereus; and that the arbitration panel was improperly

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constituted, since there was allegedly no arbitrable dispute between Cepsa and Nereus at the time the arbitrators were appointed.

For the reasons stated below, we deny plaintiff's request for declaratory and injunctive relief.

I. Incorporation of the Letter of Guaranty.

Plaintiff argues that its signing of the Letter of Guaranty did not obligate it to enter into arbitration with Nereus. It contends that while it agreed to perform the balance of the contract of affreightment under certain conditions, arbitration is not "performance," and hence it is not bound to arbitrate. We find it unnecessary to construe the meaning of the word "performance" in the contract, since by the addendum Cepsa agreed not only to perform the balance of the contract, but to "assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party [contract of affreightment]." This language is clear and unequivocal, and, we believe, compels a finding that the Letter of Guaranty does incorporate the contract's arbitration clause. We do not believe that the proviso in the Letter of Guaranty requiring Nereus to notify Cepsa of any default by Hideca causes us to modify this finding. That proviso obligated Nereus to advise Cepsa of Hideca's default, and to call upon Cepsa to "assume performance of the Charter Party." Even though this language does not reiterate that Cepsa was to assume the rights and obligations of HIDECA following alleged nonperformance, we do not believe such language was necessary.

Cases cited by plaintiffs that suggest the Letter of Guaranty does not incorporate the arbitration clause are distinguishable. In Production Steel Company of Illinois v. SS Francois L.D., 294 F.Supp. 200 (S.D.N.Y.1968), the

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court held that a holder of a bill of lading made subject to all the terms and conditions of the Charter Party was not bound by the arbitration clause of the Charter Party. In that case, unlike the instant case, the arbitration clause was expressly and unequivocally applicable to disputes between "the owners and the charterers." In the instant case, the arbitration clause is more general, and calls for arbitration of "any and all disputes of whatsoever nature arising out of this Charter. . . ." While the arbitration clause here does call for the appointment of arbitrators by "the owner" and "the charterer," we do not believe that language envinces a definite intent to preclude application of the arbitration clause to Cepsa as a guarantor of Hideca's obligations in the contract.

In Midland Tar Distillers, Inc. v. M/T LOTOS, 362 F.Supp. 1311 (S.D.N.Y. 1973) the court distinguished *Production Steel,* on the ground that in the latter case the bill of lading which purported to incorporate the Charter Party was detailed and exclusively embodied the obligations of the parties, thus operating to prevent incorporation of the arbitration clause of the Charter Party. In *Midland Tar,* however, the bill of lading provisions were devoid of detail, and the court found that the bill of lading there effectively incorporated an arbitration clause contained in the Charter Party. That case is similar to the instant case, where the letter of guaranty is in general terms. The *Midland Tar* court further distinguished *Production Steel* on the ground that the arbitration clause in the latter case was restricted to the original parties, whereas the arbitration clause before it was not so clearly and unequivocally limited. As we indicated above, the arbitration clause before us is not as specific as that in *Production Steel.*

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Memorandum Decision of Stewart, U.S.D.J., 385 F. Supp. 1155, 1975 AMC 474 (SDNY 1974).

Judge Weinfeld has stated the criteria which should be used in determining whether or not an arbitration provision similar to the one in the instant case may be enforced against the original parties only or against subsequent parties as well.

> It is true that a charter party provision for arbitration of disputes which is restricted to the immediate parties or limited to disputes "between the * * * Owners and the Charterers" . . . does not bind any but the named persons. On the other hand, an agreement to arbitrate all "disputes * * * arising out of this charter" binds not only the original parties, but also all those who subsequently consent to be bound by its terms. (footnotes omitted)

Lowry & Co. v. S. S. LeMoyne D'Iberville, 253 F.Supp. 396, 398 (S.D.N.Y. 1966), appeal dismissed, 372 F.2d 123 (2d Cir. 1967). *See also* Son Shipping Co. v. DeFosse & Tanghe, 199 F.2d 687, 688 (2d Cir. 1952). We believe that Judge Weinfeld's language is directly applicable to the instant case and that "[i]t is not necessary, in order to incorporate by reference the terms of another document, that such purpose be stated *in haec verba* or that any particular language be used." 253 F.Supp. at 398.

Thus we conclude that the Letter of Guaranty does incorporate the arbitration clause in the contract of affreightment. It thus follows that Cepsa has consented to arbitrate disputes once it has been notified by Nereus of any default by Hideca.

II. Prematurity of Arbitration

Cepsa argues that even if it is bound to arbitrate with Nereus, it cannot do so until it has been conclusively determined that Hideca has defaulted. It maintains that this

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conclusion follows from the proviso in the Letter of Guaranty that it shall only be liable for payments or damages as a result of Hideca's default after receiving written notice that Hideca is in default. We disagree. We are in accord with the judge in *Midland Tar* that any ambiguities in the letter of guaranty must be construed "in accordance with the rules generally applied to commercial contracts, in order to glean the intent of the parties from the words they used and the actions they performed in their conduct of the transaction." Midland Tar Distillers, Inc. v. M/T LOTOS, 362 F.Supp. 1311, 1314 (S.D.N.Y. 1973). In so holding, we do not find Cepsa's interpretation commercially reasonable. If plaintiff's interpretation were correct, Cepsa would never be bound to perform any of the obligations of Hideca until it were first conclusively determined, presumably by arbitration, that Hideca was in default, and until judicial appeals were exhausted. If this procedure were followed, plaintiff's guaranty would be limited effectively to paying damages at some point in the future to the defendant, unless Cepsa were willing to concede that Hideca was in fact in default. We thus conclude that Cepsa's obligations under the Letter of Guaranty came into play as soon as it received the notification from Nereus that Hideca was in default. If it is determined in the arbitration proceedings between plaintiff and defendant that Hideca was not in default, plaintiff will not be required to pay any damages. And if the arbitrators conclude that Hideca was in default, plaintiff is free to attack that finding in a later action by defendant to confirm the arbitration award. *See* Kentucky River Mills v. Jackson, 206 F.2d 111 (6th Cir. 1953), cert. denied, 346 U.S. 887, 74 S.Ct. 144, 98 L.Ed. 392.

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Memorandum Decision of Stewart, U.S.D.J., 385 F. Supp. 1155, 1975 AMC 474 (SDNY 1974).

III. Injunctive Relief.

Since we find on the merits for the defendant, we need not consider whether injunctive relief is warranted in the instant case.

For the reasons indicated, plaintiff's motions for declaratory and injunctive relief are denied. This opinion shall be considered as findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

So ordered.

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Memorandum Decision of Stewart, U.S.D.J., 1975 AMC 1009 (SDNY 1975).

HIDROCARBUROS Y DERIVADOS, C.A., *Plaintiff*,

v.

NEREUS SHIPPING, S.A. AND COMPANIA ESPANOLA DE PETROLEOS, S.A., *Defendants*.

IN THE MATTER OF THE ARBITRATION BETWEEN HIDROCARBUROS Y DERIVADOS, C.A., *Petitioner*,

v.

NEREUS SHIPPING, S.A., *Respondent*.

United States District Court, Southern District of New York,
March 21, 1975.

75 Civ. 463 and 75 Civ. 464.

CHARLES E. STEWART, JR., D.J.:

Upon consideration of the affidavits and memoranda submitted and the hearings held before this court, we order the consolidation of the pending arbitration proceedings between Nereus Shipping, S.A. ("Nereus") and Compania Espanola de Petroleos, S.A. ("Cepsa"), on the one hand, and Nereus and Hidrocarburos Y Derivados, C. A. ("Hideca"), on the other.[1] There is sufficient power in a federal district court to compel consolidation of two related

[1] The facts surrounding these cases are set forth in our memorandum of December 18, 1974, in the related case of *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 1975 AMC 474, 74 Civ. 5102. The clerk is directed to file a copy of the instant memorandum and order with the file in that case.

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arbitration proceedings, under Rules 81(a)(3) and 42(a) of the Federal Rules of Civil Procedure and under 9 U. S. Code, sec. 4, even where the agreements to arbitrate are embodied in separate contracts (although there is one common party to both agreements) and neither of the separate contracts provide for consolidated arbitration. *Robinson* v. *Warner,* 370 F. Supp. 823 (D. R. I., 1974). *See also Vigo Steamship Corp.* v. *Marship Corp.,* 1970 AMC 1377, 26 N.Y.2d 157, 309 N.Y.S.2d 165 (1970) (dictum). Here the case for consolidation is even stronger. Instead of two separate contract agreements, there is but a single charter agreement between Nereus and Hideca, with a guarantee by Cepsa embodied in Addendum 2 of the Hideca-Nereus agreement.

We believe that consolidation would be advantageous, since it would avoid the additional time and expense of separate proceedings in two matters involving common questions of law and fact. In addition, consolidation would avoid the possibility that one of the parties would be subject to inconsistent results. *Robinson* v. *Warner, supra,* at 829. Moreover, we do not believe that any party will be prejudiced by a consolidation of the two arbitration proceedings. While it is true that Nereus gained an apparent tactical advantage in appointing two arbitrators who in turn appointed a third arbitrator in the Nereus-Cepsa dispute, Nereus will be assured of an impartial arbitral tribunal by our decision to consolidate. The mere tactical advantage Nereus gained by Cepsa's previous unwillingness to accede to arbitration should not militate against consolidation in the absence of a specific showing that consolidation will be prejudicial to "a substantial right." As the New York Court of Appeals has noted in a similar admiralty case, "the mere desire to have one's dispute heard separately does not, by itself, constitute a 'substantial right.'" *Vigo Steamship Corp.* v. *Marship*

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Corp., 1970 AMC 1377, 26 N.Y.2d 157, 162, 309 N. Y. S.2d 165, 168 (1970). (citation omitted).

While both Hideca and Cepsa are agreeable to consolidation of the two arbitration proceedings, Nereus is not. Nereus contends that there is no precedent for consolidating two arbitration proceedings where the party common to both proceedings opposes consolidation. Although we have found no case ordering consolidation in such circumstances, we do not believe that this court is without power, in its discretion, to order consolidation where common questions of law or fact are present. It is also within our discretion, we believe, to order consolidation before a panel of five arbitrators, even though the parties originally agreed to arbitrate their disputes before a panel of three. *See Showa Shipping Co., Inc.* v. *Skibs A/S Agnes, etc.*, 1975 AMC 790 (Sup. Ct., Sp. Term, N.Y. Cty., 1975). It is thus

ORDERED, that the two said arbitrations are hereby consolidated for all purposes and all claims of the three parties shall be heard in said consolidated arbitration before one panel of arbitrators; and it is further

ORDERED, that the arbitration panel who shall hear all claims shall consist of five members one of whom shall be chosen by plaintiff Hideca, one chosen by defendant Nereus, one chosen by defendant Cepsa, and those three chosen shall choose the remaining two arbitrators, and it is further

ORDERED, that a copy of this order be served upon the arbitrators appointed in the arbitration previously pending between plaintiff and defendant Nereus, and those appointed in the arbitration previously pending between defendants Nereus and Cepsa.

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Opinion of U.S. Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 241, 242, 243 & 244—September Term, 1975

Argued November 5, 1975 Decided December 12, 1975

Docket Nos. 75-7069, 75-7206, 75-7207 & 75-7208

COMPANIA ESPANOLA DE PETROLEOS, S.A.,
Plaintiff-Appellant-Cross-Appellee,

against

NEREUS SHIPPING, S.A.,
Defendant-Appellee-Cross-Appellant.

HIDROCARBUROS Y DERIVADOS, C.A.,
Plaintiff-Appellee,

against

NEREUS SHIPPING, S.A.,
Defendant-Appellant,

and

COMPANIA ESPANOLA DE PETROLEOS, S.A.,
Defendant-Appellee.

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In the Matter of the Arbitration

between

HIDROCARBUROS Y DERIVADOS, C.A.,

Petitioner-Appellee,

against

NEREUS SHIPPING, S.A.,

Respondent-Appellant.

Before MEDINA, ANDERSON and MANSFIELD, Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., Judge.

Compania Espanola de Petroleos, S.A. appeals from an order of December 18, 1974, holding that it had agreed to arbitrate certain disputes with Nereus Shipping, S.A.; and Nereus Shipping, S.A. appeals from an order of March 21, 1975, consolidating two arbitration proceedings and making appropriate provision for the appointment of the arbitrators.

The orders with certain modifications are affirmed. The motion by Nereus Shipping, S.A. to dismiss the appeal from the order of December 18, 1974, is denied.

Patrick V. Martin, New York, N.Y., (Theodore P. Daly, John C. Mamoulakis, and Poles, Tublin, Patestides & Stratakis, New York, N.Y., on the brief), for Compania Espanola de Petroleos, S.A.

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Thomas A. Dillon, Jr., New York, N.Y., (Raymond J. Burke, Raymond J. Burke, Jr., and Burke & Parsons, New York, N.Y., on the brief), for Nereus Shipping, S.A.

Lawrence W. Newman, New York, N.Y. (Janna H. J. Bellwin, Baker & McKenzie, and Donovan, Donovan, Maloof & Walsh, New York, N.Y., on the brief), for Hidrocarburos y Derivados, C.A.

MEDINA, Circuit Judge:

Any system of court procedure worthy of the name requires the observance of certain fundamentals. The parties must prepare papers, sometimes called pleadings, in which they set forth the issues or disputes between them, preferably doing so in such fashion as to make it easy to separate the issues of fact from the issues of law; at the trial or hearing some written record must be made of the proceedings, either in the form of a stenographic transcript by a court reporter or by what have been sometimes euphemistically called the judge's "minutes"; if, by common consent or otherwise the issues are changed during the trial or hearing, the change must be evidenced by new or amended papers or pleadings, or by a written order by the judge or a statement made by him and in some way made a part of the written record; and, when the issues are decided by the judge, there must be some writing, generally called a judgment, in which it clearly appears that the judge has made a final disposition of the whole case or that something else remains to be done. That the observance of these fundamentals is in the interest of justice, that it tends to avoid or at least reduce confusion, the great enemy of justice, and that it greatly facilitates the functioning of an

appellate court of review is too obvious for comment. We are sorry to say that in the matter now before us neither the judge nor any of the parties seem to have been aware of some of these fundamentals, except after the event.

So we are presented with what are called four appeals, one cross-appeal, one motion to dismiss one appeal on written papers, and a miscellany of suggestions scattered throughout the briefs to the effect that, in another appeal, neither the District Court below nor our Court had any jurisdiction to make any adjudication relative to the rights and obligations of the parties. It turns out, as will appear more fully below in this opinion, that there is no merit whatever in any of these claims that we or the court below lacked jurisdiction. We have managed to penetrate the outer shell of this mass of confusion and procedural effluvia and we find buried underneath it all two relatively simple questions of law. As will more fully appear shortly in this opinion, there was a contract of affreightment, a charter party, with an arbitration clause and an Addendum No. 2 to that contract separately executed by a guarantor. The two questions are:

(1) Did the guarantor agree to arbitrate; and

(2) Was it proper for the District Judge to consolidate the arbitration between the shipowner and the guarantor with the arbitration between the shipowner and the charterer and make the necessary adjustment concerning the selection of the arbitrators?

We decide that Judge Stewart properly construed the charter party and Addendum No. 2 so as to require the guarantor to arbitrate. And we also decide that Judge Stewart had the power under the Federal Arbitration Act and Fed.R.Civ.P., Rule 42(a), to consolidate the two arbitrations and that in doing so he did not abuse his

discretion, because the two arbitrations had common questions of law and fact, and because the extensive and complicated issues were so intertwined and overlapping that it could have caused great and irreparable injustice had Judge Stewart ruled that the two arbitrations must proceed separately.

I

The Background of Undisputed Fact

A chronological survey of the course of events will serve as a background against which to focus the law points which we are called upon to decide.

On January 27, 1971, "at New York, N.Y." a charter party or maritime contract of affreightment was signed by Nereus Shipping, S.A., a Liberian corporation, an agent for owners of various vessels, as "owner" and Hidrocarburos y Derivados, S.A., a Venezuelan corporation engaged in the oil business as "charterer." These parties are referred to in the record and will be referred to in this opinion as Nereus and Hideca. This three-year maritime contract called for the transportation of 600,000 long tons of petroleum products from the Persian Gulf to various ports in Europe and the Mediterranean. It contained elaborate provisions as to the selection of the vessels, demurrage and so forth. What concerns us here especially is the arbitration clause, 24, which is as follows:

> 24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Par. 1 of this charter pursuant to the laws relating to arbitration there in force before a board of three persons consisting of one arbitrator to be ap-

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pointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above-mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement [sic]

may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

At "Madrid, 24th June, 1971," Compania Espanola de Petroleos, S.A., a large integrated Spanish oil company referred to in the record and in this opinion as Cepsa, signed "Addendum No. 2" to the agreement of January 27, 1971. This document was also signed by Nereus and Hideca. It reads as follows:

> In connection with the contract of affreightment, embodied in the Charter Party drawn up at New York and dated 27th January, 1971, between Nereus Shipping S.A. as Agents for Owners (hereinafter called the Owner), and Hidrocarburos y Derivados, C.A. (HIDECA) (hereinafter called the Charterer), being that the Charterer shall use the tonnage contracted under the present Charter Party for the transportation, during the period of three years commencing November 1971/January 1972, of crude oil under a CIF contract to be signed with Compania Espanola de Petroleos, S.A. (CEPSA) we, Compania Espanola de Petroleos, S.A., hereby agree that, should HIDECA default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party. Provided, however, that Compania Espanola de Petroleos, S.A. shall not be responsible for any payments or damages as a result of HIDECA's default, prior to receiving written notice from the Owner advising us that HIDECA is in default, and calling upon us to assume performance of the Charter Party.

It is obvious to us that these two separate documents must be read together.

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All went well until the Arab oil embargo in October, 1973, when the market rate for oil cargoes fell precipitously. The ensuing complications were many and various. We do not think it is necessary in this opinion to set them forth in detail or in summary. They are all relevant to the question of whether or not there was a default by Hideca. There are also numerous and difficult questions of interpretation of the meaning of the two documents, all of which will be questions for the arbitrators to decide in the ensuing consolidated arbitration, as the arbitration clause 24, quoted above, refers to 'Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration * * *." In this connection it is worthy of note that the arbitration is not limited to disputes recited in the original demands for arbitration. Clause 24 also provides:

> Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination.

The amounts of money involved are large, at least four millions of dollars and perhaps more. The intimations, tossed in here and there by Nereus, to the effect that perhaps Hideca is not completely responsible financially, but that Cepsa is, do no more than add to the general confusion.

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II

The Arbitration Notices and the Development of the Strategy of Nereus to Arbitrate First With Cepsa and Later with Hideca

On July 24, 1974, Nereus notified Cepsa that it claimed Hideca was in default and called upon Cepsa "to perform the balance of the Charter Party." On August 14, 1974, Nereus demanded arbitration with Hideca and on August 23, 1974, Hideca served its demand for arbitration on Nereus. That these two would have to arbitrate their differences was perfectly plain. But what position vis-a-vis arbitration would be taken by Cepsa was not known. However, on September 3, 1974, Nereus demanded that Cepsa arbitrate and on September 16, 1974, Cepsa rejected this demand and claimed it had not agreed to arbitrate. It was at this time that Nereus began to implement its strategy to have the Cepsa arbitration proceed first and the Hideca arbitration come later. If successful this strategy would be very advantageous to Nereus and very prejudicial to Hideca and Cepsa as the critical question or congeries of questions to be decided by the arbitrators relative to the alleged default by Hideca would be first decided in an arbitration to which Hideca was not a party, despite the fact that Hideca had access to the evidence relative to the alleged default and Cepsa did not. Moreover, much could be accomplished while Cepsa's obligation to arbitrate was still not adjudicated. The combination of delay by Nereus with reference to the Hideca arbitration, on the one hand, and proceeding with all possible speed with reference to the Cepsa arbitration, on the other hand, is very plain.

Although the two arbitrators representing Hideca and Nereus were promptly appointed, they just could not agree on who should be the third arbitrator. This went on for

months. It is inconceivable to us that this was just because these two arbitrators wanted to be polite to one another. In any event, while this delay continued, and at a time when Nereus knew that Cepsa claimed it was not obligated to arbitrate, Nereus appointed its original arbitrator, and, as Cepsa naturally made no appointment because of its position in the matter, within 20 days as provided in the agreement, the first Nereus arbitrator appointed a second arbitrator and the two appointed a third. So, before a court had any opportunity to decide whether Cepsa was required to arbitrate, the entire arbitration panel consisted of Nereus men.

Under the pressure of these events Cepsa started what we shall call Action No. 1 seeking a declaratory judgment to the effect that it had not agreed to arbitrate and an injunction permanently restraining Nereus from going ahead with the arbitration.

III

Action No. 1 and the Decision by Judge Stewart on December 18, 1974

When Cepsa's lawyers walked into Judge Stewart's chambers to argue the motion, they thought that the worse that could happen was the denial of their application for a preliminary injunction. It was undoubtedly their expectation that, if this motion was denied, there would be a full dress trial in due time at which all the issues of this declaratory judgment action would be fully explored. Instead, after hearing oral arguments and studying the briefs, Judge Stewart found that he disagreed with Cepsa's interpretation of the documents and he decided the whole case "on the merits" and held that Cepsa had "consented to arbitrate disputes once it has been notified by Nereus of any default by Hideca." As far as we can make out

from the record, this was a complete surprise to all parties concerned. The decision filed on December 18, 1974, does not state that the judge is granting summary judgment or that he is deciding that the complaint fails to state a claim for relief. It does not even say that the complaint is dismissed.

We shall discuss below our disposition of the appeal by Cepsa from this order of December 18, 1974, giving our reasons. In this preliminary survey of the course of events it will suffice to say that Nereus says this decision implicitly confirmed Nereus' choice of the three arbitrators in the Nereus-Cepsa arbitration, and is in effect a direction that arbitration proceed forthwith before that panel notwithstanding the inability of the arbitrators in the Hideca-Nereus arbitration to even get the latter proceeding off the ground. This is the explanation for the various procedural maneuvers by Nereus that we will discuss in due course and which have made these appeals so unnecessarily complicated and confused. Suffice it to say that we disagree completely with this interpretation of the December 18, 1974, decision as claimed by Nereus. We think all that Judge Stewart decided, and all he intended to decide, was that Cepsa had agreed to arbitrate. We affirm his conclusion on that issue. In addition, however, in order to free Cepsa from any unnecessary prejudice as a result of its having made a good faith challenge to its duty to arbitrate, we modify the December order by removing the three Nereus arbitrators.

IV

Action No. 2 and the Decision of March 21, 1975

In the course of time Hideca woke up to the fact that the failure of the two arbitrators to appoint the third

arbitrator had stalled the arbitration. They also woke up to the fact that Nereus might activate the arbitration referred to in Action No. 1 and that this would be prejudicial to the Hideca-Nereus arbitration which, it was claimed by Hideca, should logically be tried first. So, Hideca on January 30, 1975, commenced two civil proceedings: (1) an action against Nereus and Cepsa for an injunction restraining them from proceeding with the arbitration referred to in Action No. 1 until after the conclusion of the Hideca-Nereus arbitration; and (2) a petition against Nereus pursuant to Section 5 of the Federal Arbitration Act (9 U.S.C. Section 5) for the appointment of the third arbitrator in the Hideca-Nereus arbitration. These two proceedings were heard together by Judge Stewart. Again we have no transcript. But it does appear that someone suggested that the two arbitrations be consolidated. This suggestion was vigorously opposed by counsel for Nereus. As the parties were all before the court, the result was the consolidation order from which one of the appeals before us was taken.

V.

There is No Merit in any of the Procedural Motions Made by Nereus

This brings us to the barrage of procedural motions and maneuvers by Nereus that have reduced the record before us to a state of utter confusion.

The main brief of Nereus refers to a cross-appeal by Nereus bearing the docket number 75-7208. The supposed notice of cross-appeal is not in the Appendix nor it is in the Supplemental Appendix. Diligent search of all the files in these actions in the Clerk's office failed to reveal any such notice of cross-appeal. What actually had happened was that counsel for Nereus had taken a copy of

the Nereus notice of appeal in Action No. 2 from the order of March 21, 1975, and slipped it in the file in Action No. 1. He says he was told to do this by someone in the Clerk's office. This paper does not purport on its face to be a cross-appeal from the order of December 18, 1974. Nor could it, in any event, have any validity as a cross-appeal since the time to appeal or cross-appeal from the order of December 18, 1974, had long since expired when the document was placed in the file. The plain fact is that there is no such cross-appeal.

On January 17, 1975, Cepsa appealed from the order of December 18, 1974. On January 24, 1975, on voluminous papers having little to do with the matter, Nereus moved in this Court to dismiss the appeal for lack of jurisdiction. The motion was referred to the panel deciding these cases. Despite the voluminous papers and briefs, the questions presented are very simple. As with everything else in these cases, it takes time and effort to dig through a mass of confusion. All Nereus is saying is that the order of December 18, 1974, was interlocutory and not final, and also that it denied an injunction in an admiralty case, that an admiralty court had no power to issue injunctions and that the principle of *Enelow* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935) should be applied. All this is nonsense. The order was final, and is thus appealable. *Paliaga* v. *Luckenbach S.S. Co.,* 301 F.2d 403 (2d Cir. 1962). *See also* 28 U.S.C. Section 2201; *American Casualty Co. of Reading, Pa.* v. *Howard,* 173 F.2d 924 (4th Cir. 1949). This is not a suit in admiralty nor is the principle of *Enelow* concerning stays in admiralty even remotely applicable. The reference in the complaint to the maritime law and admiralty is to indicate the basis for the civil jurisdiction of the District Court, there being no diversity. This is a civil action and the papers in the file are given the Case No. 74 Civ. 5102. In the motion

papers Nereus makes no reference to this number. We deny the motion to dismiss as frivolous.

Scattered throughout the briefs are other miscellaneous claims of lack of jurisdiction. Thus it is said that, pending the determination of the appeal to this Court from the order of December 18, 1974, the District Court had no jurisdiction to make the order of consolidation. There is no substance to this claim. The filing of a notice of appeal from the December 18, 1974, order only divested the District Court of jurisdiction with respect to questions raised and decided in the order appealed from. Whether consolidation should be ordered after it was determined that Cepsa was obliged to arbitrate was an issue neither raised nor determined in the order of December 18, 1974. Thus, the well-recognized rule that a court is without jurisdiction to modify a decision during the pendency of an appeal is inapplicable here where two independent proceedings were involved. *See* Moore, *Federal Practice* ¶ 203.11 (1975); *cf. Weiss* v. *Hunna,* 312 F.2d 711, 713 (2d Cir.), *cert. denied,* 374 U.S. 853 (1963); *United States* v. *Radice,* 40 F.2d 445, 446 (2d Cir. 1930).

It is also claimed by Hideca that the order of consolidation is not appealable. But inasmuch as the order is conclusive on the issue of the obligation of the parties to arbitrate and how they are to arbitrate, and has a final and irreparable effect on the rights of the parties, it is appealable. The order not only mandated the procedural step of consolidation, it also obligated the parties to arbitrate, thereby affecting their substantive rights. We hold this order appealable. It finally adjudicated claims of right separable from, and collateral to, the rights that will be determined by the arbitrators. Those claims of right are too important to be denied review and too independent of the cause itself to preclude the parties from seeking appellate review until the arbitration is concluded.

VI

The Law Points

At last we get down to the questions of law with respect to Judge Stewart's holding that Cepsa had agreed to arbitrate and with respect to his power to consolidate the two arbitration proceedings and order the selection of five rather than three arbitrators.

A.

We agree with Judge Stewart's interpretation of Addendum No. 2 and we affirm his holding that Cepsa is obliged to arbitrate the disputes between Cepsa and Nereus. But we modify the order of December 18, 1974, so as to provide for the elimination of the three arbitrators selected by Nereus.

In his Memorandum-Opinion of December 18, 1974, Judge Stewart concluded that the Letter of Guaranty signed by Cepsa incorporated the contract's arbitration clause. The guaranty states unequivocally that in the case of Hideca's default, Cepsa is to "assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party," as well as "perform the balance of the contract." Although the guaranty does not explicitly restate the specific obligations which Hideca had undertaken and which Cepsa was to assume in the event of Hideca's default, the court found such iteration to be unnecessary in view of the broad language of the guaranty.

The determination of whether a guarantor is bound by an arbitration clause contained in the original contract necessarily turns on the language chosen by the parties in the guaranty. We are aided in our construction of the language here by prior decisions which make clear that where

an arbitration clause is applicable by its own terms to all disputes and is not limited to those arising between the Owner and Charterer, the agreement to arbitrate binds "not only the original parties, but also all those who subsequently consent to be bound by the terms of the contract." *Lowry & Co.* v. *S.S. Le Moyne D'Iberville,* 253 F.Supp. 396, 398 (S.D.N.Y. 1966), *appeal dismissed,* 372 F.2d 123 (2d Cir. 1967). *See also Son Shipping Co.* v. *De Fosse & Tanghe,* 199 F.2d 687, 688 (2d Cir. 1952). Two cases relied upon by Cepsa, *Production Steel Co. of Illinois* v. *SS Francois L. D.,* 294 F.Supp. 200 (S.D.N.Y. 1968) and *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.,* 172 F.Supp. 721 (S.D.N.Y. 1959) are distinguishable. The former case involved a narrow arbitration clause which, unlike the clause before us, was expressly applicable only to disputes between "the owners and charterers." The latter involved a guaranty which prescribed merely that the third party would "guarantee performance" by the charterer. Here, under the guaranty, Cepsa agreed both to "perform the balance of the contract" and to "assume the rights and obligations of HIDECA." Thus, the court's holding in *Taiwan* that "performance" could not include the obligation to arbitrate does not dictate our disposition here where additional obligations were expressly undertaken. We agree with Judge Stewart that the duty to arbitrate was indeed one of the rights and obligations under the contract which Cepsa, as guarantor, agreed to assume. See *Midland Tar Distilleries, Inc.* v. *M/T Lotos,* 362 F.Supp. 1311 (S.D.N.Y. 1973).

We further agree with the District Court's holding that Cepsa may be compelled to arbitrate before it is conclusively determined that Hideca is in default. That conclusion is a commercially reasonable and logical interpretation of the parties' intent. In any event, consolidation of the arbitrations moots the problem and obviates any pos-

sibility that Cepsa might prematurely be held liable to Nereus without first assessing Hideca's liability. It must be borne in mind that all questions relative to the meaning and interpretation to be given to the references in Addendum No. 2 to the "default" and the notice of the default required to be given to Cepsa are for the arbitrators to decide.

We think it is clear that Judge Stewart intended to and did decide the whole case with finality even if he did not explicitly say the complaint was dismissed. But we are troubled by his lack of sensitivity to the procedural aspects of the matter before him. It is quite true that the point of law he was deciding did dispose of the whole case. Assuming he was right, there was no point in putting the parties to the trouble and expense of a full dress trial. It would have been a simple matter to inform the parties that he contemplated the possibility of taking such action and desired to give the parties an opportunity to express their views in opposition if they so desired. After studying the matter with some care, however, we have decided to let his action stand.

Perhaps the most important reason for our doing so is that this record convinces us that he was right. Addendum No. 2 itself is, we think, clear and unambiguous. There is no claim that there were any oral conversations that would serve to explain any ambiguity. The written communications between the parties were mostly after the event and none has been called to our attention that would be admissible under the parol evidence rule. Also, we cannot ignore the fact that, immediately after the filing of the opinion of December 18, 1974, Cepsa made no motion for reargument or for a rehearing. Nor did it submit any offer of proof. Had this been done Judge Stewart would have realized what Cepsa's expectations were with reference to a full dress trial and he might have taken some corrective action.

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B.

As Judge Stewart had all the interested parties before him in an equitable proceeding and as there was ample opportunity afforded to all parties to express their views and present any testimonial or documentary evidence they thought would support these views, we think it was clearly proper for Judge Stewart to take the matter of consolidation of the two arbitration proceedings under consideration and to make the order of consolidation, even over the objection of Nereus. What the claim of prejudice by Nereus amounts to is that Nereus was prevented from pursuing a course that we think was gravely prejudicial to Hideca and Cepsa. That the consolidation was in the interest of justice is overwhelmingly demonstrated. There were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings, especially on the subject of Hideca's alleged default. Only after a full scale survey of the complicated facts could the arbitrators make an informed judgment on the subject of what sort of default and what sort of notice were intended to trigger the obligations of Cepsa under the guaranty.

Nereus claims that the District Court was without power to consolidate the arbitrations, and that consolidation in any case is improper unless the party who has arbitration agreements with the other two parties consents to that procedure. However, there is more than ample support in the case law for the propriety of a court's consolidation of arbitrations under the federal statue. *See, e.g., Robinson* v. *Warner*, 370 F.Supp. 828 (D. R.I. 1974); *Lavino Shipping Co.* v. *Santa Cecilia Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972); *Matter of Arbitration Between Chilean Nitrate & Iodine Sales and Intermarine Corp.*, 1972 A.M.C. 2460 (S.D.N.Y. 1971). We agree that Fed.R.Civ.P., Rules 42(a) and 81(a)

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(3), are applicable. Moreover, we think the liberal purposes of the Federal Arbitration Act[1] clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases, such as the one before us.

And, if this flexible and desirable remedy is to encompass consolidation, we hold this must include the essential implementation of the consolidated proceeding by moulding the method of selection and the number of arbitrators so as to fit this new situation. New situations require new remedies. To adhere to the terms of the original arbitration agreement which contemplated the appointment of a single arbitrator by each participant and the selection by them of a third arbitrator is no longer possible, especially in this case where two independent arbitrations would result in unnecessary duplication and, more importantly, possibly in inconsistent results, further delaying final resolution of the issues.

Accordingly, we affirm so much of Judge Stewart's order of March 21, 1975, as directs the consolidation of the two arbitrations but we modify so much of the order as concerns the selection of the arbitrators.

With respect to the arbitrators in the consolidated arbitration Judge Stewart held:

> ORDERED, that the arbitration panel who shall hear all claims shall consist of five members one of whom shall be chosen by plaintiff Hideca, one chosen by defendant Nereus, one chosen by defendant Cepsa, and those three chosen shall choose the remaining two arbitrators, * * *.

For these directions we substitute the following, by way of modification of the order appealed from:

(1) Each of the three parties shall appoint its arbitrator within twenty (20) days after the filing of our opinion in

this case and, if any party shall fail to nominate its arbitrator within this time, this arbitrator shall be appointed by the District Judge. The three arbitrators thus chosen shall jointly appoint two additional arbitrators.

(2) The appointment of the two additional arbitrators must be done by the unanimous action of the three arbitrators already appointed by the parties. And, if such unanimous selection of the two additional arbitrators is not made within ten (10) days after the three original arbitrators have been chosen, then the two new arbitrators shall be selected by the District Judge.

Having considered at length a variety of alternatives for the composition of the panel and for the selection of the panel members, we are convinced that the method we have chosen is the only method that will give each of the parties fair and equitable treatment. Moreover, we do not see how this method of selection of five arbitrators can be prejudicial to Nereus. We believe that it is important that each party have its own representative, a provision which also appears in the contract, and thus we agree with Judge Stewart's selection of a five-man panel. We feel this will best accommodate the newly ordered consolidation and the original contract provisions.

It is our hope that the parties will now get down to business.

FOOTNOTE

[1] *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted* 362 U.S. 909, *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960); *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362, 364-65 (1965); *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

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Petroleos, S.A.
v.
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December 12, 1975
I Concur
R.P.A.

Compania Espanola de
Petroleos, S.A.
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Nereus Shipping, S.A.
December 10, 1975
I Concur
W.R.M.

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PETITION FOR REHEARING *EN BANC*

Nereus Shipping, S.A., as appellant, respectfully petitions for rehearing of its appeals in the captioned cases pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and pursuant to Rule 35 for consideration by this Honorable Court *en banc*.

The decision of this Court rendered on December 12, 1975 was the first decision by any United States Court of Appeals requiring consolidation of two separate arbitration proceedings governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The separate arbitrations involved different parties and consolidation was opposed by Nereus Shipping, S.A. (hereinafter referred to as "Nereus" or "Appellant"), which had arbitration agreements with Compania Espanola De Petroleus, S.A. (hereinafter referred to as "Cepsa") and Hidrocarburos y Derivados C.A. (hereinafter referred to as "Hideca"). The decision is also unique in that it removed the entire panel of three arbitrators appointed pursuant to the arbitration agreement in the Nereus-Cepsa arbitration. Another innovation in the decision is that it established a procedure for appointing five arbitrators to conduct the consolidated arbitration, despite the fact that each of the arbitration agreements provided for a panel of three arbitrators.

As the first decision to remove an entire panel of arbitrators, the decision conflicts with prior decisions in *San Carlo Opera Co.* v. *Conley*, 163 F.2d 310 (2d Cir. 1947) and *Sanko Steamship Co. Ltd.* v. *Cook Industries Inc.*, 495 F.2d 1260 (2d Cir. 1973). The arbitration agreement between Nereus annd Cepsa did not require the intervention of the Court to institute arbitration proceedings and the decision of this Court appears to conflict with *Kentucky River Mills* v. *Jackson*, 206 F.2d 111 (6th Cir. 1953), cert. denied 346 U.S. 887; *Standard Magnesium Corp.* v. *Fuchs*, 251 F.2d 455 (10th Cir. 1957), and *A/S Ganger Rolf* v. *Zeeland Tramp Ltd.*, 191 F.Supp. 359 (S.D.N.Y. 1969). None of the foregoing decisions are referred to in Judge Medina's opinion, although the effect of the decision on maritime and other arbitrations will be most extensive. The result is to involve the courts in fashioning arbitration agreements rather than simply enforcing them in accordance with their terms.

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The decision of this Court rendered on December 12, 1975 so substantially affects the rights of litigants under the Federal Arbitration Act as to merit consideration by this Court *en banc*.

POINT I

The removal of appointed arbitrators is a departure from prior decisions.

The District Court, in its decision and order dated December 18, 1974, in what this Court refers to in its opinion as "Action No. 1", stated, in part, as follows:

> "After Nereus named an initial arbitrator and Cepsa failed to name its own arbitrator, Nereus named a second arbitrator pursuant to the above clause. Those two arbitrators then appointed a third arbitrator in accordance with the arbitration clause of the contract." (A-101)*

Pages 11 and 15 of this Court's decision state respectively, in part, as follows:

> "* * * we modify the December order by removing the three Nereus arbitrators.
>
> * * *
>
> We modify the order of December 18, 1974 so as to provide for the elimination of the three arbitrators selected by Nereus."

The panel of arbitrators were all members of the Society of Maritime Arbitrators, the third arbitrator was the President of the Society, and there has never been a suggestion that any member of the panel was not an unbiased and proper arbitrator. In *San Carlo Opera Co.* v. *Conley*, 72 F.Supp. 825, 833 (S.D.N.Y. 1946), aff'd 163 F.2d 310 (2d Cir. 1947), the Court held, in part, as follows:

> "The power of the courts, to set aside an award of a board of arbitrators, after bias or prejudice is shown, is well settled (citing authorities). But where the dispute has proceeded to arbitration, the court does not appear to have the power to order a substitution of arbitrators. In Williston, Contracts, 1923, it is observed: 'The American statutes contain no provision for vacating the office of arbitrator in the event he is

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* References to pages with the prefix "A" are to the Joint Appendix.

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shown to be biased or prejudiced during the proceeding.'"

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In *Sanko Steamship Co.* v. *Cook Industries, Inc.*, 495 F.2d 1260, 1264 (2d Cir. 1973), this Court held, in part, as follows:

> "In such cases, a refusal by the panel to compel an allegedly partial arbitrator to step down will generally be reviewable by a district court only after an award has been made. Catz Am. Co. v. Pearl Grange Fruit Exch., 292 F.Supp. 549, 551 (S.D.N.Y. 1968); Petition of Dover S.S. Co., 143 F.Supp. 738, 742 (S.D.N.Y. 1956); San Carlo Opera Co. v. Conley, 72 F.Supp. 825, 833 (S.D.N.Y. 1946), aff'd, 163 F.2d 310 (2d Cir. 1947). But see Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972). However, in most cases, the parties themselves will be able to compel the disqualification of arbitrators suspected of bias prior to the commencement of the proceedings. For example, under § 11 of the Maritime Arbitration Rules of the Society of Maritime Arbitrators, as under § 18 of the Rules of the American Arbitration Association, a party may have an arbitrator replaced simply by failing to waive a presumptive objection that arises if any circumstances are disclosed by the arbitrator prior to the hearing which tend to suggest bias."

Cepsa did not move in Action No. 1 for leave to appoint an arbitrator despite its failure to comply with the terms of the arbitration agreement (see *In Re Utility Oil Corp.*, 10 F.Supp. 678 (S.D.N.Y. 1934) and *Lobo & Co.* v. *Plymouth Navigation Co.*, 187 F.Supp. 859 (S.D.N.Y. 1960).

The arbitration panel was appointed in accordance with the terms of the arbitration agreement. This Court's decision is authority for the proposition that in order to consolidate two separate arbitrations, a federal court may remove an entire panel of arbitrators properly appointed pursuant to an arbitration agreement. In other cases the panel to be removed may have been appointed by the parties or by the American Arbitration Association or by a trade association. A subsequent motion for consolidation should not permit the Court to eliminate the entire panel of arbitrators and establish a new panel and procedure contrary to that agreed by the parties.

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POINT II

Prior to this decision federal courts have not modified arbitration agreements or intervened to order arbitration in a manner contrary to the terms of such agreement.

This Court has held that Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure permit the consolidation of arbitrations and that the remedy of consolidation "must include the essential implementation of the consolidated proceeding by molding the method of selection and the number of the arbitrators so as to fit this new situation".

This decision plainly and simply means that a Court i) need not enforce the arbitration agreement made by the parties, and ii) will become involved in fashioning a new arbitration agreement, panel and procedure. However, prior cases have held that a Court will not even compel arbitration under 9 U.S.C. § 4 where the arbitration agreement provides its own remedy for recalcitrance.

In *Kentucky River Mills* v. *Jackson,* 206 F.2d 111 (6th Cir. 1953), cert. denied 346 U.S. 887, the Court held, in part, as follows:

> "An ex parte arbitration was permissible at common law where provided for by the terms of the arbitration agreement; and, as is evident upon its face, Section 4 of the Act uses permissive language only, and does not, by its terms, require resort to the enforcement provisions thereof, if an ex parte arbitration is permitted by the terms of the arbitration agreement."

In *Standard Magnesium Corp.* v. *Fuchs,* 251 F.2d 455 (10th Cir. 1957), the Court held, in part, as follows:

> "Section 4 of the Act provides a remedy by summary proceedings in the nature of specific performance where a court order is necessary in order for the arbitration to proceed. It does not follow, however, that § 4 must be resorted to in every case where one party refuses to proceed with the arbitration. It is permissive by its terms. If the agreement provides that where one party refuses or fails to submit to arbitration, then an arbitrator may be appointed and that the arbitration may proceed ex parte, and further provides for the procedure to be followed in such an ex parte proceeding, there is no occasion to invoke the remedy of § 4. Such a remedy is necessary only in

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those cases where one party refuses to participate in the arbitration and a court order is necessary in order for the arbitration to proceed ex parte.

• • •

It is only where the arbitration may not proceed under the provisions of the contract without a court order that the other party is really aggrieved.

• • •

Such construction does not deny the other party an adequate remedy. • • •

In short, he may assert in such proceedings any defense which he could have asserted in a proceeding under § 4 and any other valid defense to the award."

In *A/S Ganger Rolf* v. *Zeeland Transp. Ltd.*, 191 F.Supp. 359 (S.D.N.Y. 1969), the Court held, in part, as follows:

"Petitioners, while conceding that they have the right under the arbitration clause to proceed ex parte, urge that they have no duty to do so and that therefore they may waive the right and elect to petition the court for relief under the Arbitration Act. The Petitioners overlook the object of the Arbitration Act which contemplates only the enforcement of the arbitration agreement made by the parties themselves, in the manner they themselves provide. Petitioners, by waiving rights and remedies given to them by the arbitration clause cannot thereby acquire a new right not granted by the Act to have the court compel arbitration in a manner different from that provided by the clause. Having designed their own remedy for recalcitrance they cannot, over respondent's objection, ignore that remedy and pursue another."

Gavlik Construction Co. v. *The Wickes Corp.*, 389 F.Supp. 551, 555 (W.D. Penn. 1975) held, in part, as follows:

"Having determined that both Gavlik and Wickes are obliged to arbitrate their disputes with Campbell, the next question is whether consolidated arbitration is properly ordered. We hold that it is not.

The court notes once again that arbitration is a matter of contract, and parties cannot be forced to arbitrate matters they have not agreed to arbitrate. John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

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• • • Campbell also cites Robinson v. Warner, 370 F.Supp. 828 (D.R.I. 1974), in which the court con-

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> strued Rules 81(a) (3) and 42(a) of the Federal Rules of Civil Procedure to require consolidated arbitration among the contractor, the architect, and the owner. The law on this question, is not settled, however, as the Robinson court, particularly notes.
>
> We cannot accept defendant's broad reading of the arbitration provision. The agreement itself fails to specify consolidated arbitration and the provision in Article 22 that the arbitrators be chosen 'one by the contractor' and 'one by the subcontractor' (and the third by the first two), clearly implies that only those two parties were expected to participate in any arbitration. No mention is made of how an arbitration would occur involving a three-party dispute."

The decision of this Court establishing a five member arbitration panel in which Cepsa and Hideca, who have a common position concerning the question of default, each appoint one arbitrator and Nereus appoints one arbitrator is prejudicial to Appellant. In the District Court cases from this Circuit referred to in this Court's opinion, the party requesting arbitration was a party to both arbitration agreements and waived its right to appoint an arbitrator.[1]

POINT III

The decision of this Court contains errors of fact.

There are several errors of fact in the decision of Judge Medina which we believe have affected the tone, tenor and result of the decision, and have unfairly reflected criticism of attorneys for Appellant, and of the other attorneys involved in the appeals.

(1) The decision incorrectly states at page 12 as follows:

> "This brings us to the barrage of procedural motions and maneuvers by Nereus that have reduced the record before us to a state of utter confusion."

The fact is that Nereus made no procedural motions whatsoever in the District Court and no "maneuvers" other than to file affidavits in opposition to motions by Cepsa

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and Hideca in Actions No. 1 and No. 2 commenced by them as plaintiffs (Joint Appendix pages i to vii).[2]

The only motion made by Nereus was its motion dated January 24, 1975 in this Court to dismiss Cepsa's appeal (A-108) from the decision of Judge Stewart dated December 18, 1974 in Action No. 1. This motion was made two weeks before Hideca commenced Action No. 2 and was on the basis that "the order appealed from refusing to stay by injunction arbitration under a maritime charter party was entered in an action in admiralty and is not a final or appealable order".

This Court, by order dated February 11, 1975, signed by Judges Hays, Feinberg and Holden, directed that "the question of jurisdiction should be briefed" and referred the motion to the panel hearing the appeal. However, Judge Medina's opinion is critical of the motion, and states at page 13, in part, as follows:

> "On January 24, 1975, on voluminous papers having little to do with the matter, Nereus moved in this Court to dismiss the appeal for lack of jurisdiction."

In fact, the motion consisted of a three page affidavit, and a seven page brief and, in view of the Court's order dated February 11, 1975, Judge Medina's statements that the points were "nonsense" and the appeal "frivolous" are unjustified.

(2) The decision incorrectly states at page 3:

> "So we are presented with four appeals, one cross-appeal, one motion to dismiss one appeal on written papers • • •"

---

[1] In *Lavino Shipping Co.* v. *Santa Cecilia Co.*, 1972 AMC 2454, 2457 (S.D.N.Y. 1972), the Court held, in part, as follows:

> "The petition to compel a consolidated arbitration is granted. Cecilia has appointed Mr. Lloyd C. Nelson as its arbitrator, and Lauro, Mr. Peter Siebel, Jr. Lavino has expressed its willingness to waive its right to appoint an arbitrator. I hereby order that the consolidated arbitration be submitted to Messrs. Nelson, Siebel and a third arbitrator to be appointed by them."

[2] The decision at page 11 also incorrectly refers to "the various procedural maneuvers by Nereus that we will discuss in due course and which have made these appeals so unnecessarily complicated and confused".

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In fact, there are a total of four, not five, appeals arising from three separate proceedings in the District Court.

(3) The decision incorrectly states at pages 12 and 13 as follows:

> "The main brief of Nereus refers to a cross-appeal by Nereus bearing the docket number 75-7208. The supposed notice of cross-appeal is not in the Appendix nor is it in the Supplemental Appendix. Diligent search of all the files in these actions in the Clerk's office failed to reveal any such notice of cross-appeal. What actually had happened was that counsel for Nereus had taken a copy of the Nereus notice of appeal in Action No. 2 from the order of March 21, 1975, and slipped it in the file in Action No. 1."

In fact, Judge Stewart's decision dated March 21, 1975 (A-218-222) carried the docket numbers 75 Civ. 463 and 75 Civ. 464, which on appeal became Docket Nos. 75-7206 and 75-7207. However, Judge Stewart's decision also stated as follows (A-219):

> "The facts surrounding these cases are set forth in our memorandum of December 18, 1974, in the related case of *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 74 Civ. 5102. The clerk is directed to file a copy of the instant memorandum and order with the file in that case."

Three notices of appeal on behalf of Nereus were properly filed in the District Court on March 26, 1975 and are contained in the Joint Appendix (A-109, A-223 and A-294). Each notice of appeal carried the proper District Court docket number and indicated on its face that the appeal was from Judge Stewart's March decision and order.

Each notice of appeal was entered in the District Court Docket for the appropriate action and was certified to the Court of Appeals (A-1, A-111 and A-229). Counsel for Nereus did not "slip" anything in any file in any clerk's office and the comment to such effect in the Court's decision is not correct, not justified and unfairly derogatory.

With respect to Docket No. 75-7208, on April 4, 1975, counsel for Nereus properly filed Form C in the Clerk's office of this Court identifying the case as 74 Civ. 5102

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(i.e. Action No. 1) and the related cases as 75 Civ. 463 and 464 (i.e. Action No. 2).[a]

On April 8, 1974, this Court issued a Scheduling Order with the caption of Action No. 1 and containing the docket numbers 75-7069 (i.e. Cepsa's appeal) and 75-7208 (i.e. Nereus' appeal). Copies of Form C, the Scheduling Order and the Receipt concerning docket number 75-7208 (formerly 74 Civ. 5102) are annexed as Appendix A and demonstrate the error of the Court's comments above and the further comments on page 13 that Nereus was cross-appealing the December 18, 1974 decision in Action No. 1.

(4) Referring to Action No. 2, which was commenced by Hideca on February 7, 1975, the Court's decision at pages 11 and 12 states, in part, as follows:

> "In the course of time Hideca woke up to the fact that the failure of the two arbitrators to appoint the third arbitrator had stalled the arbitration. They also woke up to the fact that Nereus might activate the arbitration referred to in Action No. 1."

In fact, the attorney for Hideca attended all hearings in Action No. 1 and submitted an affidavit in support of

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[a] In Form C, counsel for Nereus stated as follows:

"BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW: The arbitration panel of three arbitrators was appointed pursuant to the terms of the Arbitration Agreement between the parties which was held by the Court in its decision dated December 18, 1974 to be enforceable. In that decision the Court denied the motion by CEPSA for a preliminary injunction. The decision of the Court in 75 Civ. 463, which was ordered filed in this case, has the effect of removing the three arbitrators previously appointed and requiring arbitration before five arbitrators, two of whom will be appointed by opponent's espousing the same position."

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Cepsa's motion for an injunction.[4] Hideca then waited approximately 2½ months before commencing Action No. 2 seeking the same relief which was denied in Action No. 1.

(5) This Court's decision states, in part, at page 9 as follows:

> "Although the two arbitrators representing Hideca and Nereus were promptly appointed, they just could not agree on who should be the third arbitrator. This went on for months. It is inconceivable to us that this was just because these two arbitrators wanted to be polite to one another."

This comment by Judge Medina together with his comment in the preceding sentence referring to "delay by Nereus with reference to the Hideca arbitration" is unwarranted, incorrect and unfairly reflects on the motives and actions of the arbitrator appointed by Nereus.

In fact, the record indicates that the arbitrator appointed by Nereus suggested to the arbitrator appointed by Hideca six members of the Society of Maritime Arbitrators, including its past president (A-282) and the professor of admiralty at Fordham University Law School (A-246). The Rules of the Society of Maritime Arbitrators state that "No person shall serve as an Arbitrator if he has any financial or personal interest in the result nor if he has acquired detailed prior knowledge of the dispute" (A-274). Similarly, the statement at page 10 that "the entire arbitration panel consisted of Nereus men" demeans the three independent arbitrators appointed in the Nereus-Cepsa arbitration.

To suggest that there was intentional delay by the arbitrator appointed by Nereus is unwarranted by the record. Moreover, Hideca could have moved for the Court to appoint a third arbitrator at any time. There was no delay

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[4] The affidavit of Hideca's attorney dated November 27, 1974, filed in the action by Cepsa against Nereus for an injunction, 74 Civ. 5102 (A-95-98) stated, in part, as follows:

> "10. We submit that if plaintiff is obliged to arbitrate with defendant that arbitration should be stayed until the arbitration between Hideca and the defendant has been completed."

FILED THROUGH

by Nereus which appointed an arbitrator prior to the appointment of an arbitrator by Hideca.

(6) The language of Page 3 of the decision is demeaning and critical of all attorneys involved in the case primarily because no transcript of oral argument in chambers was kept by the District Court. The intemperate language of the entire opinion in an important decision reflects adversely upon the District Court, four law firms which regularly practice in the Federal Courts, and upon this Court.

Conclusion

We respectfully suggest that this case is an important case under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, which will have a significant impact on future maritime arbitrations, and that this decision is contrary to prior case law and to the language of the statute. We believe that the character of the decision and the comments therein are unworthy of this prestigious Court and respectfully request that Appellant's petition for a rehearing and for consideration by this Honorable Court *en banc* be granted.

Respectfully submitted,

BURKE & PARSONS
Attorneys for Appellant
Nereus Shipping, S.A.

RAYMOND J. BURKE
THOMAS A. DILLON, JR.
RAYMOND J. BURKE, JR.
Of Counsel

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ADDENDUM A

FORM C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CIVIL APPEAL PRE-ARGUMENT STATEMENT

(To be filed by appellant with Clerk of Court of Appeals and served on other parties within ten days after filing notice of appeal.)

(Attach additional sheets if space is not sufficient)

APPEAL FROM DISTRICT COURT

DISTRICT ▶	SOUTHERN
DISTRICT COURT DOCKET NUMBER ▶	74 Civ. 5102 (CES)
DATE FILED IN DISTRICT COURT ▶ (MO. DAY YEAR)	3-25-75
DATE NOTICE OF APPEAL FILED ▶	3-26-75
RELATED CASE(S) ▶	SDNY 75 Civ. 463 (CES); SDNY 75 Civ. 464 (CES)
Is this a cross appeal	YES ☐ NO ☒

CASE TITLE (Complete)

COMPANIA ESPANOLA DE PETROLEOS, S.A.,

Plaintiff-Appellee,

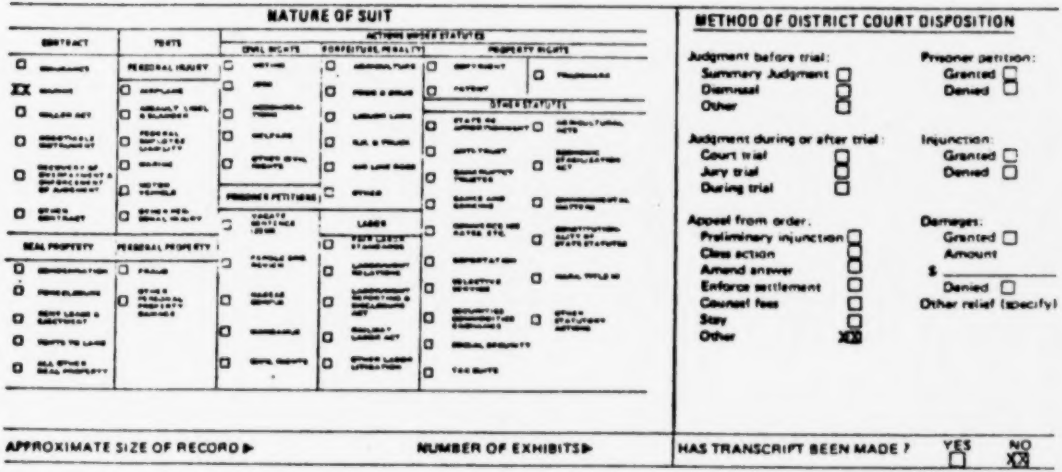
-against-

NEREUS SHIPPING, S.A.,

Defendant-Appellant.

COUNSEL NAME FOR APPELLANTS:	ADDRESS	TELEPHONE
Burke & Parsons	52 Wall Street New York, N.Y. 10005	344-1030
FOR APPELLEES:		
Poles, Tublin, Patestides, & Stratakis	46 Trinity Place New York, N.Y. 10006	797-1240

(Check One Box Only)



NATURE OF SUIT

METHOD OF DISTRICT COURT DISPOSITION

Judgment before trial:
Summary Judgment ☐
Dismissal ☐
Other ☐

Judgment during or after trial:
Court trial ☐
Jury trial ☐
During trial ☐

Appeal from order:
Preliminary injunction ☐
Class action ☐
Amend answer ☐
Enforce settlement ☐
Counsel fees ☐
Stay ☐
Other ☒

Prisoner petition:
Granted ☐
Denied ☐

Injunction:
Granted ☐
Denied ☐

Damages:
Granted ☐
Amount
$ _____
Denied ☐

Other relief (specify)

APPROXIMATE SIZE OF RECORD ▶

NUMBER OF EXHIBITS ▶

HAS TRANSCRIPT BEEN MADE ? YES ☐ NO ☒

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW:
The arbitration panel of three arbitrators was appointed pursuant to the terms of the Arbitration Agreement between the parties which was held by the Court in its decision dated December 18, 1974 to be enforceable. In that decision the Court denied the motion by CEPSA for a preliminary injunction. The decision of the Court in 75 Civ. 463, which was ordered filed in this case, has the effect of removing the three arbitrators previously appointed and requiring arbitration before five arbitrators, two of whom will be appointed by opponent's espousing the same position.

ISSUES PROPOSED TO BE RAISED ON APPEAL:
1. Whether the Court can change the Arbitration Agreement between the parties to require arbitration before five instead of three arbitrators selected in a different manner than provided in the Agreement.
2. Whether the Court can remove three duly appointed arbitrators without cause.
3. Whether by consolidating two separate arbitrations, opponents may appoint two arbitrators and the party to both arbitration agreements appoint only one.

I, Attorney for the Appellant, hereby certify that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript (FRAP 10 (b). (Check one box)
I ☐(1) have already ordered the transcript to be prepared OR
☐(2) will order it to be prepared at the time required by the Staff Counsel in the implementation of the Civil Appeals Management Plan.
☒(3) No transcript as matter disposed of on motion papers.

COUNSEL'S SIGNATURE Norman A. Dietz | DATE 4/4/75

FAGES FOUND VERTICALLY

FLED THROUGH

Petition for Rehearing

Addendum A

ited States Court of Appeals

FOR THE

SECOND CIRCUIT

TITLE OF CASE

MPANIA ESPANOLA DE PETROLEOS, S.A.,

Plaintiff-Appellee,

v.

REUS SHIPPING, S.A.,

Defendant-Appellant.

CIVIL APPEAL
SCHEDULING ORDER # 3

Docket No. 75-7069
75-7208

Noting that Poles, Tublin, Patestides & Stratakis, Esqs. counsel for the appellant Compania Espanola de Petroleos, S.A. has filed a notice of appeal on January 17, 1975 and Burke and Parsons, Esqs. counsel for Nereus Shipping, S.A. has filed a Notice of Appeal on March 26, 1975 in the Southern District of New York and a Civil Appeal Pre-Argument Statement on April 4, 1975 and Transcript Information on April 4, 1975 and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before April 25, 1975;

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before May 15, 1975;

IT IS FURTHER ORDERED that the brief of appellee be filed on or before June 16, 1975;

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of June 30, 1975.

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IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court ma appropriate.

A. DANIEL FUSARO
Clerk

By Nathaniel Fensterstock
Nathaniel Fensterstock
Staff Counsel

Dated:
April 8, 1975

CAHP 1

Petition for Rehearing

Addendum A

AO Form No. 193
Form approved by
Comp. Gen., U. S.
January 8, 1953

ORIGINAL
RECEIPT FOR PAYMENT

United States Court of Appeals

FOR THE SECOND CIRCUIT

OFFICE OF THE CLERK

Received From Burke & Parsons (NAME)

Docket 52 Wall St., NYC (ADDRESS)

75-7208 (CASE NO.) De Petroleos V. Nereus (SHORT TITLE) 4-4-75 (DATE)

ACCOUNT	AMOUNT
Clerk's Fee for docketing case	50 00
74 Civ. 5102 below	
T-4577	
Miscellaneous Fees	
Certified copy of	
Copy of Opinion	
Certificate of admission	
Copy of Court Rules	
TOTAL	50 00

Clerk ☐
Deputy Clerk ☐
Cler. Asst. ☒ AC

32723

☆ U. S. GPO : 1975-500-243

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